76-963

UNITED STATES OF AMERICA

IN THE SUPREME COURT

UNITED STATES OF AMERICA,

v

MILTON J. LARGENT and
JONATHAN B. HIGDON,

Petitioners.

DISTRICT COURT OPINION
ISSUED JULY 2, 1974

CAMPBELL, KURZMAN,
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff, CRIMINAL NO. 4-80831

v

MILTON J. LARGENT,

Defendant.
_____/

MEMORANDUM OPINION
ISSUED JULY 2, 1974

Defendant Largent is charged in one indictment with five (5) counts of using extortionate means in attempting to collect an extension of credit, and one (1) count of conspiracy to accomplish that end; all in violation of Sections 894 and 2, Title 18, United States Code. The true bill of indictment was filed on November 22, 1973, in this court. The indictment alleges offenses which took place between February, 1969, and November 20, 1969. The total lapse of time between the alleged transaction in the indictment and the filing

of the indictment is approximately four (4) years.

On March 22, 1974, defendant filed a Motion to Dismiss Counts One and Two of the Indictment and to Dismiss the Entire Indictment. The grounds for bringing these motions are that:

1. Nowhere in Count One is it alleged that one or more of the alleged conspirators did any act to effect the object of the alleged conspiracy;

2. Count Two is duplicated by Count Six;

3. The entire indictment is based upon statutes which are unconstitutional or in the alternative;

4. The entire indictment was returned by the grand jury following an undue and prejudicial delay in presentment by the government; and

5. The entire indictment is vague and indefinite.

Count One

Defendant contends that Count One should be dismissed for the reason that nowhere is it alleged in the indictment that one or more of the alleged conspirators did any act to effect the object of the conspiracy.

The question as to whether the pleading in the indictment of an overt act to effect the object of the conspiracy is specifically required under 18 U.S.C. Section 894 has been answered in the negative in United States v. Smith, 464 F. 2d 1129 (CA2 1972), at page 1134:

> "In the first place, this was not an indictment under the general conspiracy section, 18 U.S.C. Section 371, which requires the proof of overt acts in a prosecution under that section. This was an indictment under 18 U.S.C. Section 894, which provides both for the completed crime as well as the conspiracy and under such a statute there is no necessity to set forth overt acts in the indictment. Singer v. United States, 323 U.S. 338, 340, 65 S. Ct 282 (1945); United States v. Tolub, 187 F. Supp. 705, 709 (S.D. N.Y. 1960), affirmed, 309 F. 2d 286 (CA2 1962)."

The above case is completely dispositive of the motion to dismiss. For that reason, the motion of defendant to dismiss Count One is denied.

Count Two

Defendant next contends that Count Two should be dismissed for the reason that Count Two is identical to Count Six except that Count Six alleges a time period inclusive of the time period alleged in Count Two.

The government urges in good faith that Counts Two and Six detail two (2) separate and distinct incidents of extortion against William R. Michael. In Count Two, the government's proof would show that defendants Largent and Higdon caused the threat of and the use of violence to take place sometime between June 1, 1969 and July 31, 1969. In Count Six, the same two defendants allegedly caused a separate and distinct act of extortion between June 1, 1969, and August 31, 1969.

If indeed two separate offenses are alleged, there is no double jeopardy ground upon which to dismiss Count Two. For the present, we must assume that there are two separate offenses alleged; and for that reason, double jeopardy cannot come into play to dismiss Count Two of this indictment.

As for the time overlap for periods relating to the Count Six offense and the dates of the offense alleged in Count Two, the Court notes that "[i]t seems well settled that an allegation as to the time of the offense is not an essential element of the offense charged in the indictment and 'within reasonable limits, proof of any date before the return of the indictment and within the statute of limitations is sufficient.'" Russell v. United States, 429 F. 2d 237, at 238 (CA5 1970). The government indicates that the exact dated throughout the entire indictment are not known to the government or to witnesses, and the dates charged in

the indictment are the best dates known. There is no clearer way for the government to charge when the extortions took place in this indictment. The Court, upon fair reading of the indictment feels that the government has complied with the Russell case by stating the time of the offenses within "reasonable limits."

Since the overlap in dates need not and could not be prevented by the government, the Court finds nothing improper with the dating of the offenses in Counts Two and Six. The fact that the time span in Count Six includes the time span of Count Two is not a reason to find that the offenses alleged in both counts are necessarily one and the same offense. Therefore, the overlap in dates does not cause a conclusion that there is only one offense present in Count Two and Count Six; and the Court need not dismiss Count Two.

In conclusion, if at trial it appears that only one of the offenses charged in Counts Two

and Six is provable by reason that there is a duplication of a single offense in the indictment, then a renewal of this motion to dismiss in the form of a Motion for Acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure would be appropriate. 8 Moore's Federal Practice -- Cipes, Criminal Rules.

For all of the above reasons, the defendant's motion to dismiss Count Two of the indictment is denied.

The Entire Indictment

A. Defendant asserts that the entire indictment should be dismissed for the reason that Sections 891 and 894 of Title 18, United States Code, upon which the said indictment is based, are unconstitutional to the extent that they purport to proscribe, as federally criminal, conduct with respect to the collection or attempted collection of any gambling debt as alleged in the indictment.

The defendant is charged with aiding, abetting, inducing and procuring the use of extortionate means to collect an extension of credit, in violation of Section 894 of Title 18, United States Code. The subject of the present indictment is a gambling debt.

The government maintains that the statute upon which the indictment is based is constitutional and relies on United States v. Perez, 402 U.S. 146 (1970). Curiously, defendant relies upon the same case, but as it was decided by the Second Circuit Court of Appeals; United States v. Perez, 426 F. 2d 1073 (1970). Citing this as his authority, defendant claims that the activities of which he is charged do not affect commerce and thus may not be proscribed by Congress.

Defendant is mistaken as to what Perez stands for in regard to Sections 892-894 of Title 18, United States Code. The activities delineated and codified in the statute were

found in Perez to affect commerce, and thus the statute is a permissible exercise of the commerce powers of Congress. However, an "impact" on commerce need not be pleaded and proved. The Sixth Circuit has upheld convictions for activities forbidden by Sections 892-894. See United States v. Marchesani, 457 F. 2d 1291 (CA6 1972).

Congress, in passing Sections 891-895, did not intend to limit prosecution of "loan sharking" activities and/or "organized crime" under these sections. Congress stated that the gravamen of Section 894 was the use of threats, not the nature of the underlying debt or the characterization of the perpetrators:

"Extortionate Collection"

> "Not everyone who falls into the clutches of a loan shark is necessarily aware at the outset of the nature of the transaction into which he has entered. Moreover, cases will arise where the use of extortionate means of collection can be demonstrated even though it cannot be shown that a bilateral

> "understanding that such would be the case existed at the outset. Section 894(a) covers these situations by making it a criminal offense to collect an indebtedness by extortionate means, regardless of how the indebtedness arose." 1968, United States Code, Congressional and Administrative News, page 2028.

In a recent case before the Tenth Circuit Court of Appeals, that court refused confine the application of Section 894 to traditional "loan sharking" activities and upheld the conviction of a bookmaker who severely beat one of his associates for a refusal to pay a $10,000 debt assertedly owed by the associate. The defendant argued that this was in essense a "punishment" for stealing from the employer and ". . .not within the proper scope" of the statute, since there was not the kind of extension of credit that was contemplated. The court responded:

> "It is undoubtedly true that this statute was primarily aimed at what is commonly called 'loan sharking,' but it is not limited in its terms to a loan in the sense of money passing. See Perez v. United States, 402 U.S. 146, 91 S. Ct. 1357 (1971). From our reading of Perez we are convinced that the real thrust of the legislation is directed to the use of extortionate means in order to collect monies which the creditors maintain are owing to them, regardless of whether the loan arose from a traditional type of loan or resulted from the assumption of responsibility as a result of force or threats. The relationship of the use of extortionate means of collection extension of credit to bookmaking and similar activities was specifically noted in Perez. The indebtedness which is now before us is within the Act's ambit." United States v. Briola, 465 F. 2d 1018, 1021 (CA10 1972).

The Court finds that the activity which Section 894 is devised to combat is the use of threats of force to collect an alleged debt, and that debt need not arise out of traditional "loan sharking."

For all the above reasons, the Court must find the defendant's motion to dismiss the entire indictment based on the ground that the

charging statutes are unconstitutional as applied is without merit. Therefore, the Court must hold the motion of defendant based on the above ground to be without merit and is therefore denied.

B. Defendant next claims undue delay, prejudicial to him, between the last offense charged in the indictment and the date of presentment to the grand jury, which requires dismissal of the entire indictment.

Defendant seeks an evidentiary hearing to show prejudice, citing United States v. Giacalone, 477 F. 2d 1273 (CA6 1973), for the proposition that the failure to offer evidence of prejudice to the district court will preclude appeal on that point. To show that undue delay has prejudiced him, defendant claims he must show actual prejudice or intentional delay, citing Giacalone. However, a reading of the Giacalone case does not indicate that a mere intentional delay is sufficient to warrant dismissal of the

indictment under a due process claim. The touchstone case on this point is United States v. Marion, 404 U.S. 307 (1971). Marion makes it clear that any intentional prosecutorial delay must involve bad faith, that "the government intentionally delayed to gain some tactical advantage over [defendants] or to harass them." At page 325. Compare, United States v. Ianelli, 461 F. 2d 483 (CA2 1972).

There is no evidence thus far to indicate prosecutorial gamesmanship at work in this case, and defendant will not be granted an evidentiary hearing on this basis without some factual basis to support such a charge. To permit such a hearing pre-trial would be to permit unfettered discovery of the government's case, as there are no specific allegations to provide narrowing factors to limit the inquiry at the hearing.

Secondly, defendant argues that the government had evidence of certain phone calls made by defendants Largent and Higdon at the time

of the instant offenses; thus, the government knew of those offenses nearly four (4) years ago. United States v. Giacalone does not state that a generally unjustifiable delay by the government should lead to dismissal. In fact, citing United States v. Feinburg, 383 F. 2d 60, 67 (CA2 1967), cert. denied 389 U.S. 1044, it was held that deliberate delay must give rise to actual prejudice to the accused before becoming a ground for reversal.

Thus, we come to the one allegation made by defendant of actual prejudice. It is claimed that a key witness is missing, one Rosanna Hall, who may testify as to the relationship between the unindicted co-conspirator Berryman and William R. Michael, the alleged victim of the conspiracy. Defendant asserts that were the indictment to have been handed down at a time closer to that of the offense charged therein, defendant would have the services of this witness. However, the fact

that a witness for the defendant is missing is not per se prejudicial to the defense.

At this point, there is no way of knowing what relationship to the overall case this particular witness has. To attempt to show this relationship by way of an evidentiary hearing is to really try the case. For this reason, the Court believes it would be more appropriate to raise this particular question of prejudice either during or after the actual trial. This is the procedure which seems to be approved in United States v. Marion, supra, at 324.

Thus, the motion to dismiss the indictment for reason of delay is denied, for defendant has not shown any evidence to indicate that there was an intentional delay by the government, or even that there has been any bad faith in such a delay. Additionally, there is no evidence at this point to show actual prejudice. Defendant is not precluded,

however, from showing actual prejudice at some future point in the course of this action either with respect to the witness Hall or in some other respect.

For all the above reasons, the Court holds that the motion of defendant to dismiss the entire indictment based on prejudicial delay is without merit and must be denied.

C. Defendants asks that the entire indictment be dismissed for the reason that it is vague and indefinite and would be unfair to make defendant go to trial on it.

Rule 7(c)(1), Federal Rules of Criminal Procedure, states "[t]he indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." The indictment here meets the test laid out above and further meets the test of United States v. Levinson, 405 F. 2d 971 (CA6 1968). This indictment does not mislead the defendant as to

the nature of the offense charged and will enable him to prepare an adequate defense. It also will prevent future prosecution for the same offenses.

For the above reasons, the Court holds that defendant's motion to dismiss the indictment based on the ground of vagueness is without merit and must be denied.

Evidentiary Hearing

On March 29, 1974, defendant Largent filed a Motion for Evidentiary Hearing with respect to his claim of undue pre-indictment delay on the part of the government and the consequent prejudice to him.

The Court denied the present motion in its discussion of defendant's Motion to Dismiss the Entire Indictment for reason of undue prejudicial delay.

For this reason, a further discussion of this matter is not necessary at this point.

Thus, the Motion for Evidentiary Hearing is denied.

/s/ James Harvey
JAMES HARVEY
United States
District Judge

Dated: July 2, 1974.